

Transcript of Proceedings

SEP - 1 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

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In the Matter of: :

Docket Number: 92-33

UNION PARK, FLORIDA :

-----x

DATE: July 21, 1992

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1 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

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3 In the Matter of: : MM Docket No.

4 UNION PARK, FLORIDA : 92-33

5 - - - - - x

6 The above-entitled matter came on for Hearing
7 pursuant to Notice before Edward J. Kuhlmann,
8 Administrative Law Judge, at 2000 L Street, Northwest,
9 Hearing Room Four, Washington, D.C., on Tuesday, July
10 21, 1992, at 10:00 a.m.

11 APPEARANCES:

12 On Behalf of Southwest Florida Community Radio,
13 Inc.:

14 A. WRAY FITCH, Esquire

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14 On Behalf of Federal Communications Commission:

15 JAMES W. SHOOK, Esquire
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18 On Behalf of Bible Broadcasting Network, Inc.:

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WITNESS

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(None.)

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P R O C E E D I N G S

(Time Noted: 10:01 a.m.)

JUDGE KUHLMANN: I realize that you stipulated, but I thought that this would be the easiest way to do this, and it will be. It will go more quickly, and then we will be finished. Just let me put them in a pile over here.

And then, I assume you have all brought your copies for the record?

VOICES: Yes, sir.

JUDGE KUHLMANN: For Central Florida Educational Foundation?

MR. DUNNE: Joseph Edward Dunne III of the firm of May & Dunne, Chartered.

JUDGE KUHLMANN: And for Bible Broadcasting Network, Inc.?

MR. SMITHWICK: Gary Smithwick, Your Honor, of Smithwick and Belendiuk.

JUDGE KUHLMANN: And for Southwest Florida Community Radio, Inc.?

MR. FITCH: Wray Fitch, Your Honor, Gammon and Grange.

JUDGE KUHLMANN: Okay. And for MIMS Radio, Inc.?

MR. SIMPSON: Stephen C. Simpson, Your Honor.

1 JUDGE KUHLMANN: And for Hispanic Broadcast
2 System, Inc.?

3 MR. OYSTER: James L. Oyster.

4 JUDGE KUHLMANN: And for the Mass Media?

5 MR. SHOOK: James Shook.

6 MR. SMITHWICK: Your Honor?

7 JUDGE KUHLMANN: Mr. Dunne, are you going to
8 file a reply to your petition to enlarge against MIMS?

9 MR. DUNNE: Yes, sir.

10 JUDGE KUHLMANN: Okay. When are you going to
11 do it?

12 MR. DUNNE: Monday, sir.

13 JUDGE KUHLMANN: Okay. Good enough. Fine.
14 Because, I read the opposition. I assume you have?

15 MR. DUNNE: Yes, sir.

16 JUDGE KUHLMANN: And you know, it was in the
17 contract.

18 MR. DUNNE: We will be replying, Your Honor.

19 JUDGE KUHLMANN: Okay. Good enough, but that
20 looks pretty airtight to me. Not so?

21 MR. DUNNE: We may convince you otherwise.

22 JUDGE KUHLMANN: Oh. Okay. Good enough. I
23 mean, I am not going to say I am easy to convince, but
24 you can convince me.

25 Anyway, and then I will look at the

1 amendment, and the Bureau has already stated that the
2 amendment is okay, so now, while I am on that subject,
3 you are going to use a new tower --

4 MR. SIMPSON: Yes, Your Honor.

5 JUDGE KUHLMANN: -- at the new site? So when
6 will the FAA determine whether that tower is
7 acceptable?

8 MR. SIMPSON: Your Honor, the tower is less
9 than 200 feet, and they should sign off on it within
10 the next week or two.

11 JUDGE KUHLMANN: Okay. That is all I wanted
12 to know.

13 And then, also, do you have to submit a plan
14 for -- environmental plan to the Bureau?

15 MR. SHOOK: Your Honor, our technical review
16 covered the environmental aspect also.

17 JUDGE KUHLMANN: Oh, it did cover the
18 environmental?

19 MR. SHOOK: It is meant to cover everything,
20 and the only concern that we had was with respect to
21 the FAA. That was specifically --

22 JUDGE KUHLMANN: Okay.

23 MR. SHOOK: -- noted.

24 JUDGE KUHLMANN: Good.

25 MR. SHOOK: Everything else we're okay with.

1 JUDGE KUHLMANN: I did not know that.

2 MR. SHOOK: Yes, sir.

3 JUDGE KUHLMANN: I did not understand that.

4 Good. That is why I raised it, because I wanted to be
5 sure I understood everything. I did not want anything
6 outstanding.

7 And then, I will look at what you have got to
8 say, and I will think about it. Okay? Good enough.

9 All right, then. Is there anything else,
10 now?

11 MR. SMITHWICK: Your Honor, one thing. You
12 asked the question earlier if we had supplied our
13 copies of the -- the record copies to the reporter. I
14 gave an original to the reporter a few moments ago, and
15 in checking, found that I only had one additional copy.
16 My paralegal was supposed to bring other copies. She
17 came in.

18 JUDGE KUHLMANN: Yes. You have to have two.

19 MR. SMITHWICK: I understand. She came in
20 and indicated that she did not have the additional copy
21 I thought she had.

22 I would like to request permission to make
23 another copy, and give it to the reporter.

24 MR. SIMPSON: Your Honor, I can give him my
25 copy, and then he can supply the copy to me subsequent

1 to the --

2 JUDGE KUHLMANN: Okay.

3 MR. SMITHWICK: Thank you, Your Honor.

4 MR. DUNNE: Your Honor, I have the same
5 problem. I have only the originals of the joint
6 hearing exhibit, and my exhibits. We had a problem
7 with our copying machine this morning.

8 JUDGE KUHLMANN: Oh. Okay.

9 MR. DUNNE: I apologize.

10 JUDGE KUHLMANN: Well, you will have to
11 supply additional copies to the reporter eventually,
12 because, you know, I think we use one now to put them
13 into the memory machine, and then the other one, we do
14 actually have a docket where one copy is put that's used
15 by the people at the Commission.

16 MR. DUNNE: Wray, were you going to
17 volunteer?

18 MR. FITCH: Yes. I was going to volunteer.

19 JUDGE KUHLMANN: Okay. Well, let us just go
20 through the exhibits, and we will start with Mr. Dunne,
21 and we will start with Central Florida Educational
22 Foundation.

23 MR. DUNNE: Your Honor, may I?

24 JUDGE KUHLMANN: Just a second. I have got
25 to find them. Okay. Go ahead.

1 MR. DUNNE: Your Honor, may I go slightly out
2 of turn, and talk first about the joint coverage study?

3 JUDGE KUHLMANN: Surely. Go ahead.

4 MR. DUNNE: The joint coverage study was
5 prepared by agreement of all the parties pursuant to
6 the 307(b) issue, Issue 2. It was exchanged with all
7 parties. It consists of thirteen pages, including a
8 Declaration of Kevin Fisher.

9 JUDGE KUHLMANN: All right. The joint
10 coverage study is received into evidence.

11 (The document referred to
12 above was marked Joint Exhibit
13 No. 1 for identification, and
14 was received into evidence.)

15 JUDGE KUHLMANN: Now, the reporter has two
16 copies of this?

17 MR. DUNNE: She does not, Your Honor. I will
18 hand her this copy, and probably one other.

19 JUDGE KUHLMANN: Okay. Would you give her
20 one copy now, so she can stamp it?

21 MR. SHOOK: Just so that it is clear,
22 Your Honor, we did review it, and we have no objection.

23 JUDGE KUHLMANN: Okay. The joint coverage
24 study is received.

25 Now, Central Florida Educational Foundation?

1 MR. DUNNE: Yes. Central Florida Educational
2 Foundation, Inc., offers 10 exhibits in total,
3 Your Honor.

4 JUDGE KUHLMANN: Okay. And you have at least
5 one copy of that for the reporter?

6 MR. DUNNE: I actually have two copies of it.

7 JUDGE KUHLMANN: Okay. Would you give that
8 to the reporter, please, so she can stamp them as we go
9 along?

10 Just for future reference, the ones that are
11 in folders or spiral bound, or whatever, those should
12 not be given to the reporter. You should just give
13 them copies that, where the exhibits are attached,
14 because they cannot put those in the docket that way,
15 and they will just take them out of there, anyway, and
16 it is just a lot of effort for you and for them.

17 All right. Would you identify the exhibits,
18 and we will mark them received?

19 MR. DUNNE: Okay. These 10 exhibits,
20 Your Honor, are: Exhibit Number 1, Legal
21 Qualifications and Corporate Structure. Exhibit 2,
22 CFEF Educational and Cultural Objectives, and its
23 proposed methods to meet those objectives. Exhibit 3,
24 CFEF Methods of Determining Community Needs. Exhibit
25 4, CFEF Means of Implementing Its Educational and

1 Cultural Objectives. Exhibit Number 5, Past Broadcast
2 Record of CFEF Principals. Exhibit Number 6, CFEF
3 Proposed Program Schedule. Exhibit Number 7,
4 Biographical Data of James S. Hoag. Exhibit Number 8,
5 Biographical Data for Thomas H. Moffitt, Jr. Exhibit
6 Number 9, Auxiliary Power Proposal. And Exhibit Number
7 10, Engineering Statement.

8 (The documents referred to
9 above were marked Central
10 Florida Educational Foundation
11 Exhibit Nos. 1 through 10 for
12 identification.)

13 JUDGE KUHLMANN: I am assuming there is no
14 objection to any of these?

15 MR. SHOOK: Your Honor, with respect to
16 Exhibit 10, we do have a concern.

17 JUDGE KUHLMANN: Okay.

18 MR. SHOOK: The population figures that are
19 noted differ from the population figures that appear in
20 the joint engineering study recognized there. They
21 appear to be based on two different census studies, and
22 they also appear to cover different areas, but that is
23 a problem that we have in terms of --

24 JUDGE KUHLMANN: Sure.

25 MR. SHOOK: -- using Exhibit 10 when it

1 appears to conflict with the joint engineering study.

2 JUDGE KUHLMANN: What is the purpose of
3 Exhibit 10?

4 MR. DUNNE: Exhibit 10, Your Honor, was to
5 show that CFEF's proposal covers more Hispanics and
6 other minorities than the other applicants, and I
7 suggest for comparison purposes it does that.

8 JUDGE KUHLMANN: But you used different
9 census data? I mean, I don't -- did you compare
10 everyone using the same data? I have not looked at it.

11 MR. DUNNE: Yes, sir, and all applicants were
12 compared using the same data, 1990 census data.

13 JUDGE KUHLMANN: I guess I do not have any
14 trouble with that, for that point.

15 MR. SHOOK: Your Honor, I guess the next,
16 maybe this is not the time to concern ourselves with
17 this, but we were wondering what was the purpose for
18 this submission, as opposed to, we understand the joint
19 engineering study that was supposed to follow it.

20 JUDGE KUHLMANN: Yeah, I do not think it --
21 well, if you think it is not relevant, I probably agree
22 with you.

23 MR. SHOOK: Well, we think it may arguably be
24 relevant under the fourth criteria that we generally
25 use to evaluate 307(b) matters --

1 JUDGE KUHLMANN: Oh. Okay.

2 MR. SHOOK: -- such as the first matters, the
3 first reception service.

4 JUDGE KUHLMANN: Right.

5 MR. SHOOK: The second is the second
6 reception service --

7 JUDGE KUHLMANN: Right.

8 MR. SHOOK: The third is the first
9 transmission service, and then the fourth is other
10 public interest factors.

11 We are assuming that Mr. Dunne is offering
12 this under that --

13 MR. DUNNE: No, sir.

14 JUDGE KUHLMANN: No.

15 MR. SHOOK: -- and if he is not, I do not
16 know what this is for, and --

17 JUDGE KUHLMANN: No. No, no, no.

18 MR. SHOOK: -- we would then have a relevance
19 problem.

20 JUDGE KUHLMANN: No. I think it is probably
21 not relevant, but why do you think it is relevant, Mr.
22 Dunne? What issue does it come under, for example?

23 MR. DUNNE: It comes under Issue Number 3,
24 other factors in the record which indicate a superior
25 educational service.

1 We are not offering it for 307(b) purposes,
2 the 307(b) purposes case, and our view is covered by
3 the joint engineering exhibit.

4 JUDGE KUHLMANN: Okay.

5 MR. SHOOK: In that case, Your Honor, we do
6 not have a problem. We are not going to be involved --

7 JUDGE KUHLMANN: I know you are not.

8 MR. SHOOK: -- in that issue.

9 JUDGE KUHLMANN: Okay, but no one else has
10 any objection to this? Okay. Then Exhibits 1 through
11 10 are received.

12 (The documents heretofore
13 marked Central Florida
14 Educational Foundation Exhibit
15 Nos. 1 through 10 for
16 identification were received
17 into evidence.)

18 JUDGE KUHLMANN: Is 307(b) going to decide
19 this case, Mr. Shook?

20 MR. SHOOK: In my opinion, Your Honor, it
21 will.

22 JUDGE KUHLMANN: Oh. Okay.

23 MR. SHOOK: I mean, it will be more fully
24 spelled out when we submit our findings and
25 conclusions.

1 JUDGE KUHLMANN: Yes. No, no, no, no. I
2 just wondered what your view was on that.

3 MR. SHOOK: It is just a preliminary view.

4 JUDGE KUHLMANN: I understand it is
5 preliminary. Okay, good enough.

6 Next, Bible Broadcasting Network. Mr.
7 Smithwick?

8 MR. SMITHWICK: Yes, Your Honor. Bible
9 Broadcasting Network has five exhibits to offer.

10 JUDGE KUHLMANN: And have you given copies of
11 these to the reporter?

12 MR. SMITHWICK: Your Honor, I have. I have
13 given the reporter the original executed declarations
14 and also a second copy.

15 JUDGE KUHLMANN: Okay. Go ahead.

16 MR. SMITHWICK: The five exhibits are:
17 Exhibit Number 1, Time Share. Exhibit Number 2,
18 Corporate Structure, Use of Station to Advance an
19 Educational Program. Exhibit Number 3, Proposed
20 Programs. Exhibit Number 4, Superior Broadcast
21 Service. And Exhibit 5, Auxiliary Power. We request
22 these be identified for the record.

23 JUDGE KUHLMANN: Okay. They are identified
24 and received.

25

1 (The documents referred to
2 above were marked Bible
3 Broadcasting Network Exhibit
4 Nos. 1 through 5 for
5 identification, and were
6 received into evidence.)

7 MR. SMITHWICK: Thank you, Your Honor.

8 JUDGE KUHLMANN: Southwest Florida Community
9 Radio, Inc?

10 MR. FITCH: Yes, sir. I will, right now,
11 hand the court reporter an original and a copy of our
12 direct case exhibits, and I note, I was just reviewing
13 the cover page of our direct case exhibits, and I
14 apologize. I have got Bombay Public Radio in there in
15 the heading, so, I will delete that, orally.

16 JUDGE KUHLMANN: Okay. Go ahead.

17 MR. FITCH: We have got three exhibits.
18 Exhibit 1 is share time evidence, two pages. Exhibit 2
19 is Proposed Integration of Southwest Station Operations
20 Into the Overall Cultural and Educational Objectives of
21 Southwest. It is 18 pages. And Exhibit 3 consists of
22 other factors demonstrating Southwest will provide
23 superior FM educational and broadcast service, and that
24 consists of two pages, that is a two-page exhibit. And
25 I, at this time, would ask that those documents be

1 identified, Your Honor.

2 JUDGE KUHLMANN: Okay. They are identified,
3 Exhibits 1, 2, and 3.

4 (The documents referred to
5 above were marked Southwest
6 Florida Community Radio
7 Exhibit Nos. 1 through 3 for
8 identification.)

9 MR. FITCH: And I would ask that they be
10 accepted into evidence.

11 JUDGE KUHLMANN: They are received into
12 evidence.

13 (The documents heretofore
14 marked Southwest Florida
15 Community Radio Exhibit Nos. 1
16 through 3 for identification
17 were received into evidence.)

18 JUDGE KUHLMANN: MIMS Community Radio, Inc.?

19 MR. SIMPSON: Your Honor, we are offering no
20 exhibits --

21 JUDGE KUHLMANN: Okay.

22 MR. SIMPSON: Excuse me, no exhibits, other
23 than a 307(b) exhibit.

24 JUDGE KUHLMANN: All right. Hispanic
25 Broadcast System?

1 MR. OYSTER: Yes, Your Honor. The exhibits
2 to be identified are: Exhibit 1, Description --

3 JUDGE KUHLMANN: Have you give copies to the
4 reporter?

5 MR. OYSTER: I have previously handed an
6 original and one copy to the reporter.

7 The exhibits are: Exhibit 1, Description of
8 the Applicant. Exhibit 2, Hispanic's Cultural and
9 Educational Objectives. Exhibit 3, How the Proposed
10 Operation of the Station Will Be Integrated Into the
11 Overall Cultural and Educational Objectives of the
12 Service Area. Exhibit 4, How the Proposed Station
13 Operations Will Meet the Needs of the Community.
14 Exhibit 5, Hispanic's Ability to Effectuate Its Plans.
15 Exhibit 6, Whether a Share Time Arrangement Between the
16 Applicants Would Result in the Most Effective Use of
17 the Channel. Exhibit 7, 307(b) Analysis. And Exhibit
18 8, Channel 6 Site.

19 (The documents referred to
20 above were marked Hispanic
21 Broadcast System Exhibit Nos.
22 1 through 8 for
23 identification.)

24 JUDGE KUHLMANN: Do you have any objections
25 to any of these, Mr. Shook?

1 MR. SHOOK: Your Honor, we have got problems
2 with Hispanic Exhibits 7 and 8.

3 JUDGE KUHLMANN: I thought you might.

4 Okay. What are your objections?

5 MR. SHOOK: Well, Your Honor, we were under
6 the impression that the 307(b) analysis was completely
7 covered in the joint engineering exhibit, and again --

8 JUDGE KUHLMANN: Okay. Well, let us ask, and
9 find out.

10 Why are you submitting this, when I too
11 thought that the 307(b) analysis that was being
12 submitted as evidence in the hearing was in the joint
13 exhibit?

14 MR. OYSTER: Your Honor, we set forth in our
15 outline in the proceeding that we would be offering --

16 JUDGE KUHLMANN: No, but everyone agreed that
17 you were going to do a joint 307(b) exhibit.

18 MR. OYSTER: On the engineering.

19 JUDGE KUHLMANN: Well, you can provide your
20 own analysis in the findings, if you want, but an
21 exhibit means that you are submitting additional
22 evidence beyond the joint exhibit.

23 MR. OYSTER: Yes. Your Honor, we do believe
24 that it is relevant.

25 JUDGE KUHLMANN: Well, it may be a correct

1 analysis, I do not know, but you cannot submit
2 additional evidence if you are part of the joint
3 exhibit on the 307(b) issue.

4 I mean, I asked everyone. I said, if you go
5 back and look at the transcript of the original
6 prehearing, I said that if you decided to go along that
7 you had to go along completely.

8 MR. OYSTER: Your Honor, I did not understand
9 your ruling.

10 JUDGE KUHLMANN: Yes. No.

11 MR. OYSTER: I understood that it applied to
12 the engineering factors.

13 JUDGE KUHLMANN: Well, if there were other
14 factors, they too should have been put into the joint
15 exhibit.

16 MR. OYSTER: Well, I did not understand that,
17 Your Honor.

18 JUDGE KUHLMANN: Otherwise it is not a joint
19 exhibit, it seems to me, on that issue.

20 MR. OYSTER: Well, it is joint with respect
21 to the engineering analysis. That is what I understood
22 it to be.

23 JUDGE KUHLMANN: Did anyone else have another
24 understanding other than I have stated?

25 MR. SHOOK: Your Honor, we had thought that,

1 with respect to 307(b), as I said, those four factors
2 that I had mentioned before, if they were going to be
3 considered, that they would be considered in the joint
4 exhibit.

5 JUDGE KUHLMANN: Yes. I did, too. I read
6 the joint exhibit to see what you did do and it seemed
7 to me that it had to be done that way.

8 I am going to reject Exhibit Number 7.

9 (The document heretofore
10 marked Hispanic Broadcast
11 System Exhibit No. 7 for
12 identification was rejected
13 from evidence.)

14 MR. OYSTER: Your Honor?

15 JUDGE KUHLMANN: I am sorry?

16 MR. OYSTER: I am sorry. I was going to make
17 an additional statement.

18 JUDGE KUHLMANN: Okay. Go ahead.

19 MR. OYSTER: You have already ruled, so I
20 will --

21 JUDGE KUHLMANN: All right.

22 MR. OYSTER: I guess there is no point.

23 JUDGE KUHLMANN: It just seemed to me that it
24 had to come in jointly. Otherwise, it seemed to me the
25 Bureau might have called witnesses and things of that

1 sort. I think we had to assume that the joint exhibit
2 was going to be the exhibit.

3 All right. And the Channel 6 site?

4 MR. SHOOK: Yes, Your Honor. As I mentioned,
5 we also have a problem with this Hispanic Exhibit 8.

6 It appears to us that this is almost in the
7 nature of a motion to enlarge the issues, in terms of
8 whether, I guess it is Central Florida. Let me make
9 sure I have got this right.

10 Actually, I am not entirely certain at this
11 point, you know --

12 JUDGE KUHLMANN: What is the purpose of it?

13 MR. SHOOK: -- who this is meant for.

14 JUDGE KUHLMANN: What is the purpose of this
15 exhibit, Channel 6 Site?

16 MR. OYSTER: Your Honor, this exhibit is to
17 demonstrate that the technical proposal upon which
18 Central relies is unsuitable for the purpose indicated.
19 In other words, they are proposing to put an additional
20 antenna on the Channel 6 tower, without diplexing, and
21 Channel 6 has stated that it will not permit this.

22 JUDGE KUHLMANN: Then why did you not
23 petition to enlarge?

24 MR. OYSTER: That is a good question.

25 JUDGE KUHLMANN: It is an excellent question.

1 MR. OYSTER: And perhaps we will.

2 JUDGE KUHLMANN: Well then, you are going to
3 have to, because I am not going to take this exhibit.
4 I mean, this is not the proper way to raise an issue in
5 a proceeding. Okay?

6 MR. OYSTER: Yes, Your Honor.

7 JUDGE KUHLMANN: Exhibit 8 is rejected.

8 (The document heretofore
9 marked Hispanic Broadcast
10 System Exhibit No. 8 for
11 identification was rejected
12 from evidence.)

13 JUDGE KUHLMANN: Are there any objections to
14 any of the other exhibits?

15 MR. SHOOK: No, Your Honor.

16 JUDGE KUHLMANN: Okay. Exhibits 1 through 6
17 are received.

18 (The documents heretofore
19 marked Hispanic Broadcast
20 System Exhibit Nos. 1 through
21 6 for identification were
22 received into evidence.)

23 JUDGE KUHLMANN: 7 and 8 are rejected.

24 Now, let me see if I have done everything I
25 want to do.

1 The intervenor, the person who asked to
2 intervene, is not here?

3 MR. SHOOK: Your Honor, I have some
4 information on that.

5 JUDGE KUHLMANN: Okay.

6 MR. SHOOK: I was in contact with attorneys
7 for the prospective intervenor yesterday. They
8 indicated they would not file --

9 JUDGE KUHLMANN: Oh, they did?

10 MR. SHOOK: -- a petition for leave to amend
11 with respect to the second MIMS amendment.

12 JUDGE KUHLMANN: Okay, because when we spoke
13 with them yesterday, they told us they did not know.

14 MR. SHOOK: I spoke with them late in the
15 day.

16 JUDGE KUHLMANN: Oh. Okay.

17 MR. SHOOK: It was probably 4:00 o'clock --

18 JUDGE KUHLMANN: Good.

19 MR. SHOOK: -- in the afternoon.

20 JUDGE KUHLMANN: So I do not have to worry
21 about them?

22 MR. SHOOK: No, Your Honor. You should not
23 be receiving another petition for leave to intervene
24 from them.

25 JUDGE KUHLMANN: Okay. Good enough.